Komoco Motors Pte Ltd v Faridah bt Abdullah

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1182–05 OF 2012
MOHD HISHAMUDIN, MAH WENG KWAI JJCA AND ROHANA YUSUF J
8 APRIL 2013

B

C

Civil Procedure — Appeal — New evidence — Appellant sought to admit at hearing of appeal letters from authorities clarifying typographical errors in previous documents — Whether appellant aware of errors before trial but failed to rectify them — Whether letters of clarification of errors obtained from authorities after conclusion of trial were 'newly discovered evidence' — Whether appellant failed to satisfy requirement in r 7(3A)(a) of the Rules of the Court of Appeal 1994

D

The appellant ('Komoco'), a Singapore-based company, had sued the respondent, a Singaporean citizen, in the Malaysian High Court for specific performance of an alleged sale and purchase agreement ('SPA') executed between the parties. Komoco claimed that by a SPA dated 24 February 2003, the respondent agreed to sell it a piece of land ('the land') she owned in Malaysia. The company claimed that being a foreign entity it had obtained the approval of the Foreign Investment Committee ('FIC') and the consent of the State Authority of Johor to the sale. Komoco claimed that although it had paid the respondent the deposit and earnest money under the SPA and complied with all administrative and statutory requirements the respondent refused to complete the transaction. In her defence, the respondent said she entered into a SPA of the land not with Komoco but with another entity named Komoco Investment Pte Ltd from whom she never received any payment whatsoever and she had considered the SPA as having lapsed. The trial court dismissed Komoco's claim on the ground (i) the letter from the Economic Planning Unit ('EPU') granting the FIC approval referred to a SPA dated 24 February 2006 and not 24 February 2003; and (ii) the letter from the state's Director of Lands and Mines granting the consent to the sale referred to the purchaser of the land as Komoco Holdings Pte Ltd and not the appellant. Komoco filed the instant appeal against the High Court's decision followed by a notice of motion to adduce four documents as new evidence to be considered at the hearing of the appeal pursuant to r 7(3A)(a) of the Rules of the Court of Appeal 1994 ('RCA'). The documents were two letters written by Komoco's solicitors respectively to the EPU and to the Director of Lands and Mines, Johor, pointing out the typographical errors in the FIC approval and in the consent to sale concerning the SPA date and the purchaser's name; and the two replies from the respective departments confirming the errors were made and agreeing that the SPA date should be 24 February 2003 and that Komoco was the

E

F

G

H

I

purchaser of the land. In moving the motion, Komoco claimed that the respondent's failure at the trial to call the officers from the EPU and the Lands and Mines Department to testify, despite having given their names on her list of witnesses, denied Komoco the opportunity to cross-examine the witnesses to rectify the two clerical errors. The respondent objected to the notice of motion.

Held, dismissing the motion with costs:

(1) The appellant failed to satisfy the requirements of r 7(3A)(a) of the RCA. The EPU's letter notifying the FIC's approval and the Lands and Mines Director's letter notifying the state authority's consent to the sale of the land were both dated prior to the trial and were in the appellant's possession and were, in fact, placed in its bundle of documents at the trial (see para 18).

(2) The appellant was aware of the clerical errors well before the trial. There was no explanation why rectification of the errors could not have been obtained from the respective authorities before the trial. The clarifications could have been done before the trial if there had been reasonable diligence on the appellant's part. Although the EPU's and the director's letters on the clarifications came into existence only after the conclusion of the trial, the court could not consider them to be new evidence that was not available to the appellant at the trial (see paras 19 & 21).

(3) The legal obligation was on the appellant to have rectified the clerical errors when it presented its case. The appellant should have called the relevant officers from the EPU and from the Lands and Mines Department as witnesses at the trial to clarify the errors. They should have been in the appellant's list of witnesses. There was no duty on the respondent to call those witnesses just because their names were on her list of witnesses. The naming of witnesses in a party's list of witnesses gave that party the right to call those named on the list but not a duty to call them (see para 22).

(4) This was not a case where the new evidence was not available at the time of the trial but one where the appellant failed to exercise reasonable diligence to obtain clarification about the obvious clerical errors when it was in a position to do so well before the trial (see para 23).

[Bahasa Malaysia summary

Perayu ('Komoco'), sebuah syarikat yang ditubuhkan di Singapura, telah mengambil tindakan terhadap responden, seorang warganegara Singapura, di Mahkamah Tinggi Malaysia bagi pelaksanaan spesifik ke atas dakwaan perjanjian jual beli ('PJB') yang dimeterai antara pihak-pihak. Komoco mendakwa bahawa melalui PJB bertarikh 24 Februari tersebut, responden bersetuju untuk menjual kepadanya sebidang tanah ('tanah tersebut') yang

dimilikinya di Malaysia. Syarikat tersebut mendakwa bahawa sebagai sebuah entiti asing, ia telah memperolehi kebenaran Jawatankuasa Pelaburan Asing ('FIC') dan kebenaran pihak berkuasa Negeri Johor bagi jualan tersebut. Komoco mendakwa bahawa walaupun ia telah membayar deposit dan wang pendahuluan di bawah PJB dan mematuhi keperluan-keperluan pentadbiran dan statutori, responden enggan menyempurnakan transaksi tersebut. Dalam pembelaannya, responden menyatakan bahawa dia memasuki PJB tanah tersebut dengan Komoco dan bukan suatu entiti lain iaitu Komoco Investment Pte Ltd yang mana dia tidak menerima apa-apa pembayaran pun dan dia menganggap PJB tersebut telah luput. Mahkamah bicara menolak tuntutan Komoco atas alasan bahawa (i) surat daripada Unit Perancangan Ekonomi ('UPE') yang memberikan kebenaran FIC merujuk kepada PJB bertarikh 24 Februari 2006 dan bukan 24 Februari 2003; dan (ii) surat daripada Pengarah Tanah dan Galian negeri yang memberikan kebenaran jualan merujuk kepada pembeli tanah sebagai Komoco Holdings Pte Ltd dan bukan perayu. Komoco memfailkan rayuan ini terhadap keputusan Mahkamah Tinggi diikuti dengan notis usul untuk mengemukakan empat dokumen sebagai keterangan baru untuk pertimbangan ketika perbicaraan rayuan di bawah k 7(3A)(a) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR'). Dokumen-dokumen tersebut adalah dua surat yang ditulis oleh peguamcara Komoco berkenaan UPE dan kepada Pengarah Tanah dan Galian, Johor, yang menunjukkan kesalahan tipografi dalam kebenaran FIC dan kebenaran untuk penjualan berkenaan tarikh PJB dan nama pembeli; dan dua surat jawapan daripada kedua-dua jabatan yang mengesahkan kesalahan-kesalahan yang telah dibuat dan persetujuan bahawa tarikh PJB yang sepatutnya adalah 24 Februari dan bahawa Komoco adalah pembeli tanah tersebut. Dalam mengemukakan usul, Komoco mendakwa bahawa kegagalan responden untuk memanggil pegawai-pegawai jabatan UPE dan Tanah dan Galian bagi memberi keterangan semasa perbicaraan, walaupun telah memberikan nama-nama mereka dalam senarai saksi-saksinya, menafikan peluang Komoco untuk menyoal balas saksi-saksi untuk membetulkan kesilapan perkeranian. Responden menolak notis usul.

Diputuskan, menolak usul dengan kos:

(1) Perayu gagal memenuhi keperluan-keperluan k 7(3A)(a) KMR. Surat UPE yang memaklumkan kebenaran FIC dan surat Pengarah Tanah dan Galian yang memaklumkan kebenaran pihak berkuasa negeri bagi jualan tanah diberi tarikh sebelum perbicaraan dan berada dalam milikan perayu dan telah disertakan dalam ikatan dokumen semasa perbicaraan (lihat perenggan 18).

(2) Perayu sedar akan kesilapan perkeranian sebelum perbicaraan lagi. Tiada penjelasan tentang mengapa pembetulan ke atas kesilapan-kesilapan tersebut tidak boleh diperolehi daripada pihak-pihak berkuasa sebelum perbicaraan. Walaupun surat-surat UPE dan pengarah mengenai

penjelasan timbul selepas tamatnya perbicaraan, mahkamah tidak menganggap keduanya sebagai keterangan baru yang tidak ada pada perayu semasa perbicaraan (lihat perenggan 19 & 21).

(3) Kewajipan undang-undang adalah pada perayu untuk membetulkan kesilapan perkeranian semasa ia mengemukakan kesnya. Perayu sepatutnya memanggil pegawai-pegawai dari EPU dan Jabatan Tanah dan Galian sebagai saksi-saksi untuk menjelaskan kesilapan. Mereka sepatutnya tersenarai dalam senarai saksi-saksi perayu. Tiada kewajipan ke atas responden untuk memanggil saksi-saksi tersebut hanya kerana nama mereka terdapat dalam senarai saksi-saksinya. Penamaan saksi-saksi dalam senarai saksi-saksi pihak memberikan pihak tersebut hak untuk memanggil kesemua yang dinamakan dalam senarai dan bukan kewajipan untuk memanggil mereka (lihat perenggan 22).

(4) Ini bukanlah kes di mana tiada keterangan baru semasa perbicaraan tetapi suatu kes yang mana perayu gagal menjalankan usaha yang munasabah untuk mendapatkan penjelasan mengenai kesilapan perkeranian yang jelas semasa ia dalam kedudukan untuk berbuat sedemikian sebelum perbicaraan (lihat perenggan 23).]

Notes

For cases on new evidence, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1406–1407.

Legislation referred to

National Land Code s 433B
Rules of the Court of Appeal 1994 r 7(3A)(a)

Appeal from: Civil Suit No 23(NCVC)-151 of 2011 (High Court, Johor Bahru)

Gan Teck Long (Gan & Lim) for the appellant.
Ng Chew Hor (Ng An & Associate) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is a notice of motion filed by the appellant/applicant to adduce the following documents as new evidence at the hearing of the appeal. The date of hearing of the appeal is yet to be fixed.

[2] The documents are as follows:

(a) a letter from Messrs Gan & Lim (the solicitors of the appellant/plaintiff) dated 17 July 2012 to the Economic Planning Unit, Prime Minister's Department ('the EPU'), pointing out that the EPU's letter of 27 March

2006 notifying the approval of the Foreign Investment Committee ('FIC') had stated the date of the sale and purchase agreement ('the SPA') to be '24-2-2006', whereas the actual date of the SPA was 24 February 2003. The letter sought a confirmation from the EPU that there was a typographical error in the EPU's letter;

(b) a reply letter from EPU dated 9 August 2012 to Messrs Gan & Lim confirming that the date as stated in the SPA was '24 February 2003' and not '24 February 2006' as stated in the EPU's letter (implying that there was a clerical error in the EPU's letter);

(c) a letter from Messrs Gan & Lim dated 14 August 2012 to the Director of Lands and Mines, Johor, pointing out that the director's letter notifying the state authority's consent (pursuant to s 433B of the National Land Code) dated 20 January 2009 had stated the name of their client (the appellant/plaintiff) to be 'KOMOCO HOLDINGS PTE LTD', whereas the name should have been typed 'KOMOCO MOTORS PTE LTD'; and

(d) a letter of reply dated 4 October 2012 from the Director of Lands and Mines Johor to Messrs Gan & Lim confirming that there had been a typographical error and that the letter of consent was meant for KOMOCO MOTORS PTE LTD' and not for 'KOMOCO HOLDINGS PTE LTD'.

[3] This application (under the motion) is made pursuant to r 7(3A)(a) of the Rules of the Court of Appeal 1994 that states:

> Power of Court to amend, admit further evidence, or draw inferences of fact
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made so available.

[4] The respondent/defendant opposed the application.

[5] In order to appreciate the nature of the documents and the reason for the application, we need to go into the background facts.

[6] It is not disputed that the appellant/plaintiff (after this the appellant/plaintiff shall be referred to as 'the plaintiff') is a company incorporated in Singapore and that the respondent/defendant (after this the respondent/defendant shall be referred to as 'the defendant') is a Singapore citizen and is the registered owner of a piece of land in Johor Bahru.

[7] There is a legal dispute between the plaintiff and the defendant, resulting in the present writ action. The dispute is this. The plaintiff claims that the defendant had sold her land to the plaintiff by way of a sale and purchase agreement dated 24 February 2003; and that, being a foreign entity, it had obtained the approval of the Foreign Investment Committee (FIC) (an administrative requirement of the Malaysian Government imposed on foreigners desirous of owning lands in Malaysia) and the consent of the State Authority of Johor for the purpose of the purchase (a statutory requirement under s 433B of the National Land Code imposed on foreigners desirous of owning lands in Malaysia). In its writ action for specific performance, the plaintiff complains that although it had complied with the administrative and statutory requirements, and had paid the deposit and earnest money to the defendant, yet the defendant refused to complete the sale and purchase agreement.

[8] The defendant in her defence denies ever entering into a sale and purchase agreement with the plaintiff. According to the defendant, if at all she had entered into a sale and purchase agreement in respect of the land, the entity with whom she had entered into the sale and purchase agreement was not the plaintiff but an entity known as Komoco Investment Pte Ltd, but even then she never received any payment from the purchaser (Komoco Investment Pte Ltd) and she had regarded the agreement as having lapsed.

[9] In the present case the trial concluded on the 21 March 2012 and decision was delivered on 20 April 2012.

[10] At the conclusion of the trial, the learned trial judge dismissed the plaintiff's claim. We do not have the benefit of the grounds of judgment of the learned judge as it is not exhibited in the affidavits.

[11] However, according to the plaintiff, its claim was dismissed by the High Court judge because, firstly, the EPU's letter notifying the approval of the FIC for the sale of the land to the plaintiff contains a clerical error as to the date of the sale and purchase agreement; and, secondly, the letter of the Director of Lands and Mines, Johor, notifying the consent of the state authority in respect of the sale contains a clerical error as to the name of the entity in respect of whom the consent was given (that is, the plaintiff).

[12] In urging this court to grant the motion, the position taken by the plaintiff is that it did not have the opportunity of rectifying the clerical errors at the trial because of the manner the defendant conducted the trial. The defendant had indicated in her list of witnesses that she would be calling an officer from the EPU and also an officer from the office of the director of lands and mines as her witnesses; but at the trial the defendant opted not to call these

witnesses. By reason of the decision of the defendant not to call these witnesses, the plaintiff was deprived of the opportunity of cross-examining these witnesses and to elicit evidence to rectify the clerical errors.

[13] In the present case, the legal burden is on the appellant/plaintiff as the applicant to satisfy the court that the documents that it sought to tender as fresh evidence for the purpose of the appeal were not available at the trial. Alternatively, even if the documents were available then, they could not have been obtained prior to or at the trial, even if it had exercised reasonable diligence to procure them.

[14] The plaintiff maintains that it has duly complied with the requirements of r 7(3A)(a) of the Rules of the Court of Appeal 1994.

[15] Firstly, the plaintiff contends that the EPU's letter (confirming the clerical error pertaining to the date) is dated 9 August 2012 and the director's letter (confirming the clerical error pertaining to the name) is dated 4 October 2012, meaning that both letters came into existence only after the date of the High Court decision, that is, 20 April 2012. Thus the plaintiff argued that these two letters were not available at the time of the trial.

[16] Secondly, there is the plaintiff's alternative argument. Even if the rectification of the clerical errors could have been done by the plaintiff at the trial, the failure on the part of the plaintiff to do so was due to the 'fault' of the defendant herself: the defendant chose not to call the officers from the EPU and the director's office, despite having listed these officers in her list of witnesses, thus depriving the plaintiff the opportunity of cross-examining the witnesses.

[17] In our judgment, the plaintiff has failed to satisfy the requirements of r 7(3A)(a) of the Rules of the Court of Appeal 1994.

[18] It is true that, as we have just said, the EPU's letter is dated 9 August 2012 and that the letter from the director of lands and mines ('the director's letter') is dated 4 October 2012, meaning that these letters came into existence only after the date of the conclusion of the trial (21 March 2012; and decision delivered on 20 April 2012). But this is because the plaintiff's solicitors wrote to the EPU (pointing out the error as to the date of the SPA) only on 17 July 2012, and to the director of lands and mines (pointing out the error as to the name of the plaintiff) only on 14 August 2012. It is to be recalled that the EPU's letter notifying the FIC's approval is dated 27 March 2006, and that the director's letter notifying the state authority's consent (for the transfer of the land to the plaintiff, a foreign entity) was dated 20 January 2009; and that both

these letters were, prior to the trial, in the possession of the appellant and in fact placed in the 'plaintiff's bundle of documents'.

[19] It is significant to note that there is no explanation by the plaintiff as to why the rectification as to the clerical errors could not have been obtained from the respective authorities much earlier before the trial.

[20] The plaintiffs only explanation for not seeking the clarification about the clerical errors before the trial or at the trial is that the defendant had indicated in her list of witnesses that she would be calling the relevant officers from the EPU and from the office of the director of lands and mines as the defendant's witnesses; but, then, at the trial the defendant opted not to call these witnesses; thus the plaintiff was deprived of the opportunity of cross-examining these witnesses and to get their confirmation as to the clerical errors.

[21] With respect, we are unable to accept this reasoning. First, a question that arises is this: why is it that the inquiries about the clerical errors were not made by the plaintiff to the EPU and to the director of lands and mines much earlier before the trial? After all, the plaintiff was aware of the clerical errors well before the trial. The plaintiff's affidavit in support does not address this pertinent question. Thus the clarifications could have been sought before the trial; if only there had been reasonable diligence on the part of the plaintiff. In our judgment, although the EPU's and the director's letters (on the clarifications as to the clerical errors) came into existence only after the conclusion of the trial, still we do not consider them to be new evidence that were not available to the plaintiff at the trial. On our part, for the purpose of r 7(3A)(a), we are not only concerned as to when the letters came into existence. We also look at the contents of the letters. The new evidence is in the contents of the letters. The contents concerned the confirmation of the existence, and the rectification, of clerical mistakes. But the fact remains that the clerical mistakes as to the date (of the SPA) and name (of the plaintiff) existed the very moment the letters of approval/consent were issued by the relevant authorities (27 March 2006 for the FIC's approval; and 20 January 2009 for the state authority's consent). They are, therefore, not newly discovered clerical mistakes. To repeat as to what we have earlier stated, the plaintiff was aware of the clerical mistakes well before the trial. But it did nothing to rectify the clerical mistakes.

[22] At the very least, the plaintiff should have called the relevant officers from the EPU and from the office of the director of lands and mines as witnesses at the trial to seek the necessary clarifications from them about the clerical errors; meaning that these officers should have been in the plaintiff's list of witnesses. But it failed to do so. And they are not even in the plaintiff's list

of witnesses. In our judgment, there is no duty on the part of the defendant to call witnesses from the EPU and from the director's office just because the names of these witnesses happened to be on the defendant's list of witnesses. The naming of witnesses in a party's list of witnesses gives that party the right to call the witnesses so listed; but it does not impose a duty on that party to call any of the witnesses so named. On the contrary, the legal obligation is on the part of the plaintiff (who was in possession of the letters of approval/consent and was aware of the clerical errors) to rectify the clerical errors when presenting its case. Therefore, with respect, the plaintiff's argument about the defendant's failure to 'abide' (to quote the very word used by the plaintiff in its supporting affidavit) by her list of witnesses is misconceived and devoid of any merit whatsoever.

[23] In conclusion we hold that this is not a case of where the new evidence was not available at the time of the trial. Instead, this is a case where the plaintiff had not exercised reasonable diligence to obtain the clarification about the obvious clerical errors from the EPU and the director's office, when it was in a position to do so well before the trial; and hence the requirements of r 7(3A)(a) has not been satisfied. Therefore, we cannot allow the admission of the new evidence for the purpose of the hearing of the appeal.

[24] The motion must, therefore, be dismissed with costs.

[25] Motion dismissed with costs of RM2,500.

Motion dismissed with costs.

Reported by Ashok Kumar